Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

LEE BELKNAP,

Petitioner,

v.

E.C. HENDERSON AND PHYLLIS HENDERSON,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES S. WILKINS
JACOBS, WILLIS & WILKINS, L.L.P.
105 S. St. Mary's St., Suite 2300
San Antonio, TX 78205
(210) 271-9212
Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred by affirming the judgment of the district court which is in violation of and contrary to the holdings in *Dewsnup vs. Timm*, ___ U.S. ___ 112 S.Ct. 773, 116 L.Ed. 2d 903 (1992); *In Re: Chabot*, 992 F.2d 891 (9th Cir. 1993); and *In Re: Arango*, 992 F. 2d 611 (6th Cir. 1993).

2. Whether the Court of Appeals erred in finding that a judicial lien "fixed" liability against the Chapter 7 Debtor's homestead, even though the lien was unenforceable, for purposes of avoiding the lien under the Bankruptcy Code as impairing the Debtor's exemption pursuant to 11 U.S.C. §522(f)(1).

3. Whether the Court of Appeals erred by finding that "impair" within the meaning of the Bankruptcy Code authorizes avoidance of a lien even though the impairment may not be a legal impairment.

PARTIES TO THE PROCEEDING

Lee Belknap, Petitioner

E.C. Henderson and Phyllis Henderson, Respondents

James S. Wilkins, Counsel for Petitioner

J. Vince Hightower, Counsel for Respondents and holder of a Real Property Option Agreement (i.e. Option to Purchase) filed December 3, 1991 in the Deed Records of Caldwell County, Texas at Volume 66, Pages 704-710. Said Real Property is the Respondent's homestead which is the subject matter of this Appeal.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PETITION 1

OPINION BELOW 1

JURISDICTION 2

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

CONCLUSION 20

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

In Re: Arango, 992 F. 2d 611 (6th Cir. 1993) 7

In Re: Bird, 84 B.R. 859 (Bankr.S.D.Fla. 1988) 13

Castle vs. Parrish, 29 B.R. 869 (Bankr.S.D.Ohio 1983) 14

In Re: Cerniglia, 137 B.R. 722 (Bankr.S.D.Ill. 1992) 11, 14, 15

In Re: Chabot, 131 B.R. 720 (C.D.Calif. 1991) 11, 14

In Re: Chabot, 992 F. 2d 891 (9th Cir. 1993) 6

In Re: Del Vecchio, 101 B.R. 803 (Bankr.S.D.Fla. 1989) 11, 13

Dewsnup vs. Timm, ___ U.S. ___, 112 S.Ct. 773, 116 L.Ed. 2d 903 (1992) 5

Englander Company vs. Kennedy, 424 S.W.2d 305 (Tex. Civ. App. – Dallas 1968), ref. n.r.e. 428 S.W.2d 806 (Tex. 1968) 9

In Re: Ewiak, 75 B.R. 211 (Bankr.W.D.Pa. 1987) 16

Farry vs. Sanderfoot, ___ U.S. ___, 111 S.Ct. 1825, 114 L.Ed. 2d 337 (1991) 6

In Re: Finch, 130 B.R. 753 (S.D.Tex. 1991) 10, 11

In Re: Fry, 83 B.R. 778 (Bankr.Col. 1988) 11, 14

In Re: Galvan, 110 B.R. 446 (9th Cir.BPA 1990) 5

In Re: Gartrell, 119 B.R. 405 (Bankr.W.D.N.Y. 1990) 16

In Re: Goodwin, 82 B.R. 616 (Bankr.S.D.Fla. 1988) 11

In Re: Hampton, 104 B.R. 527 (Bankr.M.D.Ga. 1989) 16

TABLE OF AUTHORITIES – Continued

Page

Harms vs. Ehlers, 179 S.W.2d 582 (Tex. Civ. App. – Austin 1944), error refused 9

In Re: Hermansen, 84 B.R. 729 (B.C.D.Colo. 1988) 14

In Re: Hines, 20 B.R. 44 (B.C.Ohio 1982)..... 14

Hoffman vs. Love, 494 S.W.2d 591 (Tex. Civ. App. – Dallas), writ ref'd n.r.e. per curiam, 499 S.W.2d 295 (Tex. 1973) 9

Hughes vs. Groshart, 150 S.W.2d 827 (Tex. Civ. App. – Amarillo 1941, no writ)..... 9

In Re: Inman, 131 B.R. 789 (Bankr.N.D.Tex. 1991) 10

Lewis vs. Brown, 321 S.W.2d 313 (Tex. Civ. App. – Ft. Worth 1959), ref. n.r.e 9

Owen vs. Owen, ___ U.S. ___, 111 S.Ct. 1883, 114 L.Ed. 2d 350 (1991)..... 14

In Re: Packer, 101 B.R. 651 (B.C.B.Colo. 1989)..... 14

Savage vs. Cohen, 113 S.W. 319 (Tex. Civ. App. – 1908)..... 9

In Re: Spearman, 124 B.R. 620 (E.D.N.Y. 1991)..... 11

In Re: Swift, 124 B.R. 475 (Bankr.W.D.Tex. 1991) 10

United States vs. Turkett, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed. 2d 246 (1981)..... 6

Williamson vs. Lewis, 346 S.W. 2d. 957 (Tex. Civ. App. – Ft. Worth 1961) writ ref..... 18

In Re: Zachary, 99 B.R. 916 (S.D.Ind. 1989)..... 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

11 U.S.C.S. §506(a) 5

11 U.S.C.S. §506(d) 5

11 U.S.C.S §522(c)(2) 12

11 U.S.C.S. §522(f) ..... *passim*

11 U.S.C.S. §522(f)(1) ..... *passim*

11 U.S.C.S. §523 15

11 U.S.C.S. §727 15

28 U.S.C. §158(d), 1291 & 1293 4

Texas Probate Code §270 ..... 17, 18

Texas Property Code §41.001, *et seq.* 17, 18

Texas Property Code §41.0021 10

OTHER

Texas Constitution, Article 16, Section 50, *et seq.* 17, 19

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, LEE BELKNAP ("Belknap") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United State Court of Appeals for the Fifth Circuit entered in this proceeding on April 20, 1994.

OPINION BELOW

The opinion of the Court of Appeals is reported as *In re: E.C. Henderson and Phyllis Henderson, Debtors (E.C. Henderson and Phyllis Henderson, Appellee vs. Lee Belknap, Appellant)*, 18 F.3d 1305 (5th Cir. 1994). The opinion of the

District Court is unreported. The Bankruptcy Court published its opinion at 155 B.R. 157 (Bankr.W.D.Tex. 1993). The opinion of the Court of Appeals and District Court are set forth in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 20, 1994. The Petitioner did not file a Motion for Rehearing, and this Petition is being filed within ninety days of the date the judgment was entered. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

Title 11 U.S.C. §522(f)(1) states:

> "Not withstanding any waiver of exemptions, the Debtor may avoid the fixing of a lien on an interest of the Debtor and property to the extent that such lien impairs an exemption to which the Debtor would have been entitled under subsection(b) of this section, if such lien is – (1) a judicial lien."

STATEMENT OF THE CASE

A. Identification of Parties and Courts

Hereinafter, the Petitioner shall be referred to as Belknap and the Respondent shall be referred to as Hendersons. The United States District Court for the Western District of Texas, San Antonio Division, shall hereinafter be referred to as District Court, and the United States Bankruptcy Court for the Western District of Texas shall hereinafter be referred to as Bankruptcy Court, and the United States Court of Appeals for the Fifth Circuit shall hereinafter be referred to as Court of Appeals.

B. Factual and Procedural Background

The Debtors, E.C. Henderson and Phyllis Henderson, filed for relief under Chapter 7 of the Bankruptcy Code on June 19, 1991. At the time of filing, the Debtors owned 131 acres of real property in Caldwell County, Texas, which is exempt under Texas Law as a rural homestead. Prior to the Bankruptcy filing, a State Court judgment was rendered against the Hendersons in favor of Belknap, on October 26, 1990, in the amount of $197,667.21. An Abstract of Judgment was filed by Belknap in Caldwell County, Texas on November 29, 1990, thereby creating a judicial lien against all non-exempt real property of the Hendersons.

On June 17, 1992, the Bankruptcy Court, the Honorable Ronald B. King presiding, denied the Hendersons' discharge pursuant to §727 of the Bankruptcy Code.

The Hendersons, on May 21, 1992, filed a Motion to Avoid the Judgment Lien under §522(f)(1) of the Bankruptcy Code, claiming that it "impairs" their homestead exemption. Belknap opposed the Motion to Avoid said Lien on the basis that the Hendersons' discharge had previously been denied and a judicial lien does not "impair" a homestead exemption in Texas, as it does not attach to the homestead under Texas Law and therefore cannot be avoided pursuant to §522(f)(1) of the Bankruptcy Code.

On the 21st day of December, 1993, the Honorable Ronald B. King, United States Bankruptcy Court, held that the judicial lien could not be avoided pursuant to §522(f)(1) of the Bankruptcy Code. The Hendersons duly perfected their appeal to the United States District Court for the Western District of Texas, San Antonio Division. On the 1st day of April, 1993, the Honorable D.W. Suttle, United States District Judge for the Western District of Texas, reversed the Bankruptcy Court and held that the judicial lien could be avoided pursuant to 11 U.S.C. §522(f)(1). Belknap appealed said Judgment and Order to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals had jurisdiction over this appeal under 28 U.S.C. §§158(d), 1291 and 1293.

On April 20, 1994, the Court of Appeals affirmed the decision of the District Court allowing the Debtors to avoid the judicial lien pursuant to 11 U.S.C. §522(f)(1).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to review the judgment of the Court of Appeals because the Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Court and/or has decided the question in a way which conflicts with applicable decisions of the Court and other Courts of Appeals.

I.

THE COURT OF APPEALS ERRED BY AFFIRMING THE JUDGMENT OF THE DISTRICT COURT WHICH IS IN VIOLATION OF, AND CONTRARY TO, THE HOLDINGS IN *DEWSNUP VS. TIMM, IN RE: CHABOT,* AND *IN RE: ARANGO.*

A.

The opinion of the Court of Appeals is in direct conflict with *Dewsnup vs. Timm,* ___ U.S. ___, 112 S.Ct. 773, 116 L.Ed. 2d 903 (1992). The *Dewsnup* opinion did not follow the "lien stripping" rationale of the *In Re: Galvan,* 110 B.R. 446 (9th Cir. BPA 1990) line of cases. The Supreme Court rejected the "strip down" of liens under §506(d) of the Bankruptcy Code. The Court ruled that §506(d) did not enable the Chapter 7 Debtor to reduce a mortgage on real property to the judicially determined value of the collateral when that value was less than the amount of the claim secured by the lien. The Court declined to interpret the lien avoiding provisions to grant the Debtors a broad new remedy allowed against claims to the extent they become "unsecured" for purposes of §506(a). The Court noted that because the *in rem* aspect of

the claim survives, any subsequently accruing increase in value would benefit the Creditor rather than the Debtor. Such a result would not impede the Debtor's "fresh start", which is limited to discharge of personal liability and does not extend to the *in rem* claim against the property.

Clearly the Court found that the Debtors are only entitled to a "fresh start", not a "head start."

B.

Additionally, the Court of Appeals opinion is in conflict with *In Re: Chabot*, 992 F. 2d 891 (9th Cir. 1993). In that case, the Ninth Circuit refused to take the broad view of the term "impair" and analyze it with reference to the "fresh start" policy. The Court held that the simpler view of §522(f) which protects the amount of the exemption only, is dictated by the plain meaning of the statute. A statute should be interpreted according to its plain meaning. See *United States vs. Turkett*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed. 2d 246 (1981). The Court also said that it should be remembered that liens and other security interest generally survive bankruptcy. *Farry vs. Sanderfoot*, ___ U.S. ___, 111 S.Ct. 1825, 1829, 114 L.Ed. 2d 337 (1991). The Ninth Circuit went on to state that the statute specifically says that the lien may be avoided "to the extent that" it impairs the exemption. Under the plain meaning of the statute, then, an exemption is not impaired unless its amount is diminished in value.

C.

The Court of Appeals opinion is also in direct conflict with *In Re: Arango*, 992 F. 2d 611 (6th Cir. 1993). In that case, the 6th Circuit stated that Third National (a Creditor) is not able, under Tennessee Law, to foreclose on its lien against (the Debtor) Arango's President, Billy D. Hughes, and enjoy the property. Therefore, Arango's present possessory interest in the property is not impaired, for the purposes of §522(f) and therefore, the lien cannot be avoided. The facts and the law are virtually the same in regards to Texas and Tennessee. In Texas, as pointed out by the Court of Appeals, homestead property is exempt from enforcement of a judicial lien. This is exactly what Tennessee Law says, but we now have two conflicting decisions.

II.

THE COURT OF APPEALS ERRED IN FINDING THAT A JUDICIAL LIEN "FIXED" LIABILITY AGAINST THE CHAPTER 7 DEBTOR'S HOMESTEAD, EVEN THOUGH THE LIEN WAS UNENFORCEABLE, FOR THE PURPOSES OF AVOIDING THE LIEN UNDER THE BANKRUPTCY CODE AS IMPAIRING THE DEBTOR'S EXEMPTION PURSUANT TO 11 U.S.C. §522(F)(1).

III.

THE COURT OF APPEALS ERRED BY FINDING THAT "IMPAIR" WITHIN THE MEANING OF THE BANKRUPTCY CODE AUTHORIZES AVOIDANCE OF A LIEN EVEN THOUGH THE IMPAIRMENT MAY NOT BE A LEGAL IMPAIRMENT.

A.

As previously stated, the Hendersons have filed their Motion to Avoid Judicial Lien Pursuant to 11 U.S.C. §522(f)(1).

Section 522(f) permits a debtor to "avoid the fixing of a lien on an interest of the Debtor and property to the extent that such lien impairs an exemption to which the Debtor would have been entitled if such lien is (1) a judicial lien."

B.

Section 522(f), Judicial Lien Avoidance, requires a two-pronged test to be satisfied before the lien will be avoided. The first and simplest test is to determine whether or not the Creditor has a judgment lien. In this

case, it is admitted by the Hendersons that Belknap has a judgment lien against the non-exempt assets of the Hendersons. Belknap's judgment lien does not attach to the homestead of the Debtors. Texas law is quite clear that a judgment lien does not attach to the homestead of a Judgment Debtor. See, *Savage vs. Cohen*, 113 S.W. 319 (Tex. Civ. App. – 1908); *Harms vs. Ehlers*, 179 S.W.2d 582 (Tex. Civ. App. – Austin 1944), error refused; *Lewis vs. Brown*, 321 S.W.2d 313 (Tex. Civ. App. – Ft. Worth 1959), ref. n.r.e.; *Englander Company vs. Kennedy*, 424 S.W.2d 305 (Tex. Civ. App. – Dallas 1968), ref. n.r.e. 428 S.W.2d 806 (Tex. 1968).

Although a judgment may be properly abstracted, it does not operate as a lien upon property previously impressed with homestead rights. *Hughes vs. Groshart*, 150 S.W.2d 827, 829 (Tex. Civ. App. – Amarillo 1941, no writ). Thus, a judgment lien simply does not attach to the homestead so long as it remains homestead. *Hoffman vs. Love*, 494 S.W.2d 591, 594 (Tex. Civ. App. – Dallas), writ ref'd n.r.e. per curiam, 499 S.W.2d 295 (Tex. 1973).

C.

Actually, the second portion of the two-prong test contains two sub-tests. The first and most important test is whether or not the lien impairs an exemption. The other portion of the test is whether or not the Debtors were entitled to claim a certain item of property as exempt. In the case at hand, these Debtors, i.e. the Hendersons, were allowed to claim their homestead as exempt.

A review of the historical basis of the Texas Property Code's exemption statutes, along with the legislative and case history of §522(f) of the Bankruptcy Code, will show that a Debtor should not be allowed to avoid a judicial lien pursuant to 11 U.S.C. §522(f)(1) against a Texas homestead.

The Texas Property Code, §41.0021, provides that "a homestead and one or more lots held for use as a sepulcher of a family or single adult who is not a member of a family or exempt from attachment, execution, and for sale for the payment of debts, except for encumbrances properly fixed on the property."

"The homestead exemption provided in this section does not apply if the debt is for: (1) all or part of the purchase money of the homestead; (2) taxes on the homestead; or (3) work and material used in constructing improvements on the homestead, if the work material had been contracted for and, in the case of a family homestead, if both spouses have given consent in the manner required by law for the conveyance of the homestead."

The Texas Bankruptcy Courts have not had many occasions to construe the types of liens that would impair a homestead claim. Other states have done so on numerous occasions. The only Texas cases that would apply to the case at hand are *In Re: Finch*, 130 B.R. 753 (S.D.Tex. 1991); *In Re: Inman*, 131 B.R. 789 (Bankr.N.D.Tex. 1991); and *In Re: Swift*, 124 B.R. 475 (Bankr.W.D.Tex. 1991). Unfortunately, none of these Texas cases are very helpful with the issues at hand.

In the states of Florida, California, Illinois, Ohio, Colorado and Indiana, there are numerous cases where the Courts have determined that a judgment lien does not impair an exemption as contemplated by §522(f). See, *In Re: Cerniglia*, 137 B.R. 722 (Bankr.S.D.Ill. 1992); *In Re: Chabot*, 131 B.R. 720 (C.D.Calif. 1991); *In Re: Finch*, 130 B.R. 753 (S.D.Tex. 1991); *In Re: Spearman*, 124 B.R. 620 (E.D.N.Y. 1991); *In Re: Del Vecchio*, 101 B.R. 803 (Bankr.S.D.Fla. 1989); *In Re: Zachary*, 99 B.R. 916 (S.D.Ind. 1989); *In Re: Fry*, 83 B.R. 778 (Bankr.Col. 1988); and, *In Re: Goodwin*, 82 B.R. 616 (Bankr.S.D.Fla. 1988).

Belknap refers the Court to *In Re: Goodwin*, supra. In that case, the Debtors attempted to avoid three judgment liens that arose in 1984. Under Florida law, the homestead exemption of real property is subordinate to only two kinds of judgment or execution liens; (a) a lien which came into existence before the property acquired homestead status, and (b) a lien for the payment of taxes and assessments thereon, obligations created for the purchase, improvement or repair thereof, or obligations contracted for house, field or labor performed on the realty.

Thus, it can readily be seen that the Florida Statutes virtually tracked the Texas Statutes with respect to homestead exemptions. That Court held that if the liens in question do not fall within the two exceptions, these liens do not impair the Debtors' homestead exemption. This exemption rises superior to the claims of this category of Creditor. If the liens fall within either of the foregoing exceptions, they do not impair the Debtors' exemption because the exemption is expressly subject to these two exceptions. In neither event did §522(f) affect the rights of

either the Debtor or the Judgment Creditors. Those rights were dictated entirely by state law. Texas law is identical.

The Court stated that the purpose of §522(f) is to provide the Debtor with the full benefit and enjoyment of available exemptions in the administration of the Bankruptcy case. Under the Florida Homestead Exemption for Real Property, the prohibition against forced sale of a homestead does not invalidate the debtor lien.

The protection is effective so long as the property retains its homestead character. If avoidance of the judicial liens was granted under §522(f), that relief would *add* an element of protection greater than the homestead exemption under state law. The Court held that in Florida, a judicial lien, which is presently unenforceable against exempt real property, does not impair the exemption.

The Court went on to further state that the proper application of §522(f)(1) involves situations where the Debtor claims either the federal exemptions or particular state exemptions for real property in which the dollar amount is limited and which do not, by their express terms, exempt property from forced sale or execution under a valid lien. In such situations, the liens, unless avoided, would in fact impair such exemptions and could be enforced under §522(c)(2).

The Court finally stated that it is beyond the scope of §522(f)(1) to declare the liens void if the Debtors' exemption is not diminished, and therefore not impaired by the lien.

The Florida Bankruptcy Courts, in the case of *In Re: Bird*, 84 B.R. 859 (Bankr.S.D.Fla. 1988) arrived at the same conclusion. In that case, the Debtors attempted to avoid a 1986 judgment lien. The Debtors argued that the lien could have a detrimental affect on the Debtors' ability to sell the homestead property. The Court said that its authority and responsibility with respect to a judgment lien is restricted as to whether or not it impairs an exemption. The Court found that the judgment lien has not prevented, or in any way impaired the Court's allowance, and recognition, of the Debtors' claim for a homestead exemption on the condominium that they have lived in since 1987. The Court found that it would be an inappropriate and impermissible extension of this Court's authority and responsibility for it to declare today that at some future unspecified day, when this property is offered for sale, this subject judgment would or would not constitute a valid lien against the sale proceeds. The Court finally found that the essential point is that the Court should not now attempt that future determination and any effort to do so would exceed the reasonable scope of jurisdiction granted under §522(f).

Most recently, in 1989, the Florida Bankruptcy Courts rendered the decision of *In Re: Del Vecchio*, 101 B.R. 803 (Bankr.S.D.Fla. 1989). In that case, the Court found that the Chapter 7 Debtors were not entitled to cancellation of judgment from state property records, though they claimed the judgment might impair homestead exemption claimed by Debtors if they ever tried to sell their residence. The Court found the possibility that the judgment, which was not a lien, might in the future interfere

with the possible sale. But, since the sale was not presently contemplated, it did not impair Debtors' exemption.

The Colorado Courts and the Ohio Courts hold the same. *In Re: Fry*, 83 B.R. 778 (Bankr.Colo. 1988) stated that, under Colorado Law, the judgment lien can never "impair" the Debtors' homestead exemption simply because the judgment lien never attaches to the exempt property. Therefore, in Colorado, §522(f) is superfluous in connection with the homestead exemption. Also, see, *In Re: Hines*, 20 B.R. 44 (B.C.Ohio 1982) and *Castle vs. Parrish*, 29 B.R. 869 (Bankr.S.D.Ohio 1983).

The two most compelling cases that support Belknap's position are *In Re: Cerniglia*, 139 B.R. 722 (Bankr.S.D.Ill. 1992) and *In Re: Chabot*, 131 B.R. 720 (C.D.Calif. 1991), Affm'd, 992 F.2d 811 (9th Cir. 1993).

The *Cerniglia* opinion stated that "it is not the purpose of §522(f)(1) to 'confirm' or 'document' the *absence* of liens on exempt property but to effect the removal of liens affixed to the Debtor's interest so that the property, which would otherwise be exempt, may pass to the Bankruptcy estate and be claimed as exempt." The *Cerniglia* court cited *Owen vs. Owen*, ___ U.S. ___, 111 S.Ct. 1883, 1835-36, 114 L.Ed. 2d 350 (1991). *Cerniglia* stated that it would be a meaningless act for the Court to order avoidance of liens under §522(f)(1) as was done in *In Re: Packer*, 101 B.R. 651 (B.C.B.Colo. 1989) and *In Re: Hermansen*, 84 B.R. 729 (B.C.D.Colo. 1988), if the Debtors' exempt property is already free of encumbering liens. The Court accordingly agreed with the *In Re: Fry*, supra, rationale which stated that where state exemption law provides that judicial liens do not attach to the Debtor's exempt

homestead interest, a Debtor's motion, under §522(f)(1), is unavailable and must be denied.

The state exemption provisions of the Texas Property Code, the Texas Probate Code and the Texas Constitution, are consistent with the purpose and effect of 11 U.S.C. §522(f)(1).

The legislative history of §522(f)(1) provides:

> Subsection (f) protects the Debtors' exemptions, his discharge, and does his fresh start by permitting him to avoid certain liens on exempt property. The Debtor may avoid a judicial lien on any property *to the extent* that the property could have been exempted in the absence of the lien.

The *Cerniglia* opinion held that §522(f) gives the Debtor only a limited power to avoid liens in order to *preserve* his exemption. The power *may not be expanded* to allow avoidance of the unsecured portion of the lien that would otherwise survive the Debtor's discharge. To so interpret §522(f)(1) would be to grant the Debtor not merely the benefit of his exemption in the homestead property but also the benefits of ownership beyond the exemption amount, including the right to any increase in the value caused by subsequent events.

D.

Most courts have held that even though a Debtor's discharge in Bankruptcy has been denied pursuant to §523 and/or §727 of the Bankruptcy code, a Debtor may file a Motion to Avoid a Lien because the policy reasons supporting a lien avoidance and nondischargeability are

different. *In Re: Gartrell*, 119 B.R. 405 (Bankr.W.D.N.Y. 1990); *In Re: Hampton*, 104 B.R. 527 (Bankr.M.D.Ga. 1989); and *In Re: Ewiak*, 75 B.R. 211 (Bankr.W.D.Pa. 1987).

The Court should look at the following realities: Belknap obtained a judgment against the Debtors on October 26, 1990, in the amount of $197,667.21. Belknap duly abstracted this Judgment Lien on October 29, 1990, thereby creating a judicial lien against all non-exempt real property of the Debtors. Then, the Hendersons filed for Chapter 7 Bankruptcy protection on June 19, 1991. On June 17, 1992, the Bankruptcy Court denied the Hendersons' discharge in Bankruptcy pursuant to §727 of the Bankruptcy Code. This puts the Creditors back into the same position as if the Hendersons had never filed the Bankruptcy. Now, the Hendersons come before the Court requesting that a judicial lien be avoided *that does not attach* to their homestead.

Let us assume, for a moment, that this Court allows the judgment lien to be avoided. This case will be closed. Let us now assume that one of the other Creditors in this case files a lawsuit against the Hendersons; obtains a judgment and abstracts that judgment; post-Bankruptcy. That judgment, like the judgment of Belknap, does not attach to exempt homestead property.

Now, let us assume that through some sort of an unexpected catastrophe, Mr. and Mrs. Henderson perish simultaneously. At that moment, if certain factors are not in place, their homestead exemption in the real property located in Caldwell County, Texas, would immediately cease.

The irony would be that the Creditor, Lee Belknap, who had the initial perseverance to pursue his claim against the Debtors to obtain a judgment and abstract of judgment, is now being punished for that perseverance. The new Judgment Lien Creditor would be allowed to "leap-frog" ahead of the Belknap judgment lien, which has been avoided, and would be allowed to share in the proceeds of the former Henderson homestead property, which has now lost its homestead status due to the simultaneous death of the Hendersons. It simply does not make sense to allow such a situation to occur.

E.

It is quite important for us to now turn to the history of the exemption statutes and case law in the State of Texas. The Texas Constitution, Article 16, Section 50, *et seq.*, the Texas Property Code, §41.001, *et seq.*, and the Texas Probate Code, §270, *et seq.*, set forth what property is homestead and exempt from the reach of Creditors. To say the least, they are quite liberal and protective. The District Court's Order and Opinion sets forth case upon case which stand for the proposition that Texas Courts have often stated that the laws of the State of Texas granting a homestead exemption are most liberal and should be zealously protected.

The key and operative word is "protected." The word protection translates to the word shield, not sword. If the Hendersons are allowed to avoid this judicial lien, which does not attach to their homestead, they will be allowed to use the protective exemption provisions of the Texas

Property Code as a sword. This was not, and has never been, the intent of the Texas Legislature or Courts.

Along with the granting of the broad exemptions, as found in the Texas Constitution, the Texas Property Code, and the Texas Probate Code, there are some limitations and burdens. One burden is that the homestead exemption may be lost by estoppel, abandonment, death or alienation. It is important to keep in mind that the purpose of the statute is to not displace a family from its homestead. Case after case set forth the broad and liberal constructions the Courts have given to insure that families are not displaced from their homesteads. They can waive their right to homestead, abandon their homestead, lose it through death, or alienate it through a transfer or conveyance. Thus, we can see some of the legislative intent at work. Hypothetically, if Mr. Henderson perishes tomorrow, the homestead would vest with Mrs. Henderson. This is very logical. No one would want to displace a widow from her homestead. This is sound law. But, then let us assume that Mrs. Henderson then passes away and there are no single, constituent family members residing at the homestead at that time. Simply stated, the homestead exemption will cease. The obvious legislative intent is to protect single family members still living at home. But, if there are no single, constituent family members living at home, the exemption must cease. The case of *Williamson vs. Lewis*, 346 S.W. 2d. 957, (Tex. Civ. App. – Ft. Worth 1961) writ ref., states that "if both spouses being deceased, homestead no longer exists and any reason for its protection under the law has ceased." Had the legislature intended for the exemption to last forever they would have so stated. Thus, the logical conclusion is that

the Creditor, i.e. Belknap, should share in the disposition of the no longer exempt estate of the Hendersons.

At present, it appears that the Hendersons desire for this lien to be avoided forever. This disregards the fact that at some future point they may desire to abandon the homestead by selling it and using the proceeds for other purposes.

If, at any time, they do abandon their homestead, Belknap should be allowed, as a valid Judgment Lien Creditor, to share in any proceeds from the sale of that homestead that the Hendersons do not reinvest in a homestead within six (6) months after the date of the sale. See, Texas Constitution, Article 16, Section 50, *et seq.*, Texas Property Code §41.001, *et seq.*, and Texas Probate Code, §270, *et seq.*

CONCLUSION

WHEREFORE, premises considered, Belknap prays that the Court reverse the decision of the Court of Appeals that affirmed the District Court's granting the Hendersons' Motion to Avoid Judicial Lien Pursuant to 11 U.S.C. §522(f)(1) and reinstate the Order of the Bankruptcy Court that denied the Hendersons' Motion to Avoid Judicial Lien Pursuant to 11 U.S.C. §522(f)(1).

Respectfully submitted,

JACOBS, WILLIS & WILKINS, L.L.P.

JAMES S. WILKINS
Counsel for Petitioner
105 S. St. Mary's St., Suite 2300
San Antonio, TX 78205
Telephone: (210) 271-9212
Facsimile: (210) 271-9389
TBC No. 21486500

DATE: July 5, 1994

In the Matter of E.C. HENDERSON and Phyllis Henderson, Debtors.

E.C. HENDERSON and Phyllis Henderson, Appellee,

v.

Lee BELKNAP, Appellant.

No. 93-8276.

United States Court of Appeals,

Fifth Circuit.

April 20, 1994.

Appeal from the United States District Court for the Western District of Texas.

Before POLITZ, Chief Judge, KING and DAVIS, Circuit Judges.

PER CURIAM:

E.C. and Phyllis Henderson (the Hendersons) filed a motion to avoid Lee Belknap's (Belknap) judicial lien on their homestead property pursuant to 11 U.S.C. § 522(f)(1). The bankruptcy court denied the motion. The district court reversed the bankruptcy court's decision. Belknap appeals. We affirm.

I. FACTS AND PROCEDURAL HISTORY

On October 26, 1990, Belknap obtained a Texas state court judgment against the Hendersons in the amount of $197,667.21. On November 29, 1990, Belknap filed an abstract of judgment in Caldwell County, Texas, on all of the Hendersons' real property in Caldwell County.

On June 19, 1991, the Hendersons filed for relief under Chapter 7 of the Bankruptcy Code. At the time of the filing of the bankruptcy petition, the Hendersons owned 131 acres of real property in Caldwell County, Texas (Caldwell County property). The bankruptcy court determined that the Caldwell County property qualified as a rural homestead under Texas law.[1]

On June 17, 1992, the bankruptcy court denied the Hendersons a discharge under § 727 of the Bankruptcy Code. After the bankruptcy court denied the discharge, the Hendersons filed a motion to avoid Belknap's judicial lien, pursuant to § 522(f)(1), on their homestead property. The bankruptcy court denied the Hendersons' motion, and the Hendersons timely appealed to the district court, 155 B.R. 157.

On appeal to the district court, the district court concluded that the bankruptcy court had erred in dismissing the Hendersons' motion to avoid the judicial lien on their homestead. The district court determined that the "mere existence of a judgment lien, although not attaching to the exempt homestead, impairs the debtor's constitutional homestead exemption and, consequently, is avoidable under § 522(f)(1)." The district court reasoned that courts which have determined that § 522(f)(1) does

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[1] Texas law defines a rural homestead as follows: "for a family, not more than 200 acres, which may be in one or more parcels, with improvements thereon; or for a single, adult person, not otherwise entitled to a homestead, not more than 100 acres, which may be in one or more parcels, with the improvements thereon." TEX.PROP.CODE ANN. § 41.002 (Vernon Supp.1994).

not allow a debtor to avoid a judicial lien on homestead property because the lien has not attached offer a restrictive and unrealistic line of reasoning. According to the district court, the real and practical ramifications of a recorded judicial lien on all of the debtor's real property is that the lien places a "cloud" on the debtor's title to the homestead property and, therefore, "impairs" the debtor's homestead exemption. Additionally, the district court determined that allowing a debtor to avoid a judicial lien on his homestead property furthers the Bankruptcy Code's important objective of allowing the debtor to gain a fresh start in his financial life. Finally, the district court reasoned that because Texas courts have consistently acknowledged that the homestead law is entitled to the most liberal construction, the Hendersons should be allowed to avoid the lien.

II. STANDARD OF REVIEW

This court reviews findings of fact by the bankruptcy court under the clearly erroneous standard and decides issues of law de novo. *Haber Oil Co. v. Swinehart (In re Haber Oil Co.)*, 12 F.3d 426, 434 (5th Cir.1994). "A finding of fact is clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with a firm and definite conviction that a mistake has been committed.' " *Wilson v. Huffman (In re Missionary Baptist Found of Am., Inc.)*, 712 F.2d 206, 209 (5th Cir.1983) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)).

III. DISCUSSION

Section 522(f)(1) of the Bankruptcy Code provides:

> Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is – (1) a judicial lien[.]

In order for a debtor to avoid a lien on exempt property under § 522(f)(1), a debtor must show: (1) that the lien is a judicial lien; (2) that the lien is fixed against an interest of the debtor in property; and (3) that the lien impairs an exemption to which the debtor would otherwise be entitled. *Hart v. Hart (In re Hart)*, 50 B.R. 956, 960 (Bankr.D.Nev. 1985). In this case, both parties agree that Belknap has a judicial lien and that the Caldwell County property is the Hendersons' homestead. The district court determined that even if Belknap's judicial lien did not attach to the Hendersons' homestead, the lien impairs an exemption of the debtor, and is therefore voidable under § 522(f)(1). In support of this position, the district court primarily relied on *Robinson v. Robinson (In re Robinson)*, 114 B.R. 716 (D.Colo.1990), and *In re Watson*, 116 B.R. 837 (Bankr. M.D.Fla.1990).

In *In re Robinson*, the Robinsons had filed for relief under Chapter 7 of the Bankruptcy Code and claimed their home as exempt under the Colorado homestead exemption. *In re Robinson*, 114 B.R. at 717. Charlotte Robinson had filed a judicial lien against the Robinsons' homestead. *Id.* The Robinsons filed a motion to avoid Charlotte Robinson's judicial lien pursuant to § 522(f)(1).

The bankruptcy court determined that the lien did not impair the Robinsons' homestead exemption and thus the Robinsons could not avoid the lien because "a judgment lien does not automatically attach to real property in Colorado." *Id.* at 717-18. The district court reversed the bankruptcy court's determination, reasoning that

> [w]hile in the State of Colorado, exemptions to the bankruptcy [e]state are governed by state law, the availability of lien avoidance provisions is governed by federal law. In this case, it makes little sense to deny the debtors access to the § 522(f)(1) lien avoidance provisions because of the vagaries of Colorado law under which a judicial lien does not attach to homestead property. To do so would deny the intent of the Bankruptcy Code in providing the debtors a fresh start and would leave debtors and creditors in limbo as to the status of judicial liens post-bankruptcy.

Id. at 720. Likewise, in *In re Watson,* the court held that the mere existence of a judicial lien impaired the homestead exemption and was therefore voidable under § 522(f)(1) because "any potential enforcement of a judgment lien in the future is a present impairment of the exemption." 116 B.R. at 838-39. The courts in *In re Robinson, In re Watson,* and the instant case determined that whether the judicial lien "fixed" on the debtor's exempt property was irrelevant to the inquiry of whether the debtor could utilize § 522(f)(1) to avoid a judicial lien. Rather, the courts concentrated solely on whether the lien's mere existence "impaired" the debtor's homestead exemption.

We do not agree that whether the judicial lien "fixed" is irrelevant to whether a debtor can utilize § 522(f)(1). Section 522(f)(1) clearly provides that the debtor may "avoid the fixing of a lien on an interest of the debtor" in exempt property "to the extent that such lien impairs an exemption." *See Farrey v. Sanderfoot*, 500 U.S. 291, ___, 111 S.Ct. 1825, 1828, 114 L.Ed.2d 337 (1991) (stating that § 522(f)(1) allows the debtor to avoid the fixing of a lien, i.e., the fastening of a liability, to an interest of the debtor in exempt property). We believe that the plain language of § 522(f)(1) allows a debtor to avoid a lien only when the judicial lien fastens a liability to *and* impairs the debtor's exempt property.

Therefore, the initial question that we must answer in this appeal is whether the Belknap's lien "fixes" against the Hendersons' homestead. Numerous Texas cases have stated that a properly abstracted judgment never attaches to a homestead so long as it remains homestead property. *E.G., Hoffman v. Love*, 494 S.W.2d 591, 593-94 (Tex.Civ.App. – Dallas 1973) ("[A] judgment, though duly abstracted, never fixes a lien on the homestead so long as it remains homestead."), *writ ref'd n.r.e. per curiam*, 499 S.W.2d 295 (Tex.1973); *Harms v. Ehlers*, 179 S.W.2d 582, 583 (Tex.Civ.App. – Austin 1944, writ ref'd) (noting that "no abstract of judgment lien could or did attach" to the parties' homestead). Section 52.001 of the Texas Property Code provides:

> Except as provided by Section 52.0011, a first or subsequent abstract of judgment, when it is recorded and indexed in accordance with this chapter, constitutes a lien on the real property of the defendant located in the county in which the

> abstract is recorded and indexed, including real property acquired after such recording and indexing.

TEX.PROP.CODE ANN. § 52.001 (Vernon Supp. 1994).[2] Section 41.001 of the Texas Property Code provides that a homestead is "exempt from seizure for the claims of creditors." TEX.PROP.CODE ANN. § 41.001 (Vernon Supp. 1994). Reading these provisions without the benefit of Texas case law would certainly lead one to conclude that a judicial lien in Texas does fasten a liability on the homestead property is exempt from the *enforcement* of a judicial lien. This reading of the relevant Texas statutes is supported by *Exocet, Inc. v. Cordes*, 815 S.W.2d 350 (Tex. App. – Austin 1991, no writ). In *Exocet*, the court explained that

> [w]hen an abstract of judgment is recorded and indexed in accordance with chapter 52 of the Property Code, it "constitues a lien on the real property of the defendant located in the county . . . , including real property acquired after such recording and indexing." Homestead property is not excluded from the scope and

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[2] Furthermore, article 16, section 50 of the Texas Constitution provides:

> Sec. 50. The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon . . . No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon. . . .

> effect of this statute prescribing the legal consequences of perfecting a judgment lien by recording and indexing an abstract of the judgment. Section 41.001 of the Property Code provides, however, that a "homestead" is "exempt from seizure for the claims of creditors except for encumbrances properly fixed on homestead property."
>
> Under these statutory provisions, a judgment lien is "perfected" or brought into existence against a debtor's property, by recording and indexing an abstract of the judgment in the county where the property lies. The debtor's homestead is not exempt from the perfected lien; rather, the homestead is exempt from any seizure attempting *to enforce* the perfected lien.

Id. at 352 (citations omitted). While we recognize that the issue may be open to debate, we conclude that under Texas law Belknap's judicial line did "fix," i.e., fasten a liability against the Hendersons' homestead – albeit an unenforceable one.

Now that we have determined that a judicial lien does "fix" on a Texas homestead, we must decide whether the lien "impairs" the Hendersons' homestead exemption. Whether a judicial lien "impairs" a debtor's exemption under § 522(f) is a question of federal law. *City Nat'l Bank v. Chabot (In re Chabot)*, 992 F.2d 891, 894 (9th Cir.1993); *Heape v. Citadel Bank of Independence (In re Heape)*, 886 F.2d 280, 282 (10th Cir.1989); *In re Kelly*, 133 B.R. 811, 813 (Bankr.W.D.Tex.1991). The district court determined that Belknap's judicial lien did "impair" the Hendersons' homestead exemption because the lien placed a "cloud" on the Hendersons' title. *See Packer v.*

General Motors Acceptance Corp., 101 B.R. 651, 653 (Bankr.D.Colo.1989) (holding that a judicial lien "impaired" the debtor's homestead exemption even though it did not attach because the lien "may leave debtor's title to real property clouded, lead to future litigation, prevent a closing, preclude title insurance, require posting of a bond, or otherwise impair or impede a debtor's right to deal with his real property post-petition in a free and unfettered manner"). Belknap counters by arguing that the Hendersons' homestead exemption cannot be "impaired" by his judicial lien because it cannot be enforced against the Hendersons' homestead property for so long as the Caldwell County property remains the Hendersons' homestead. In support of this argument, Belknap cites the decisions of several courts that have concluded that when a judicial lien does not attach to homestead property it does not "impair" the debtor's exemption and thus cannot be avoided because the lien cannot be enforced against a debtor's exempt property. *E.g.*, *In re Cerniglia*, 137 B.R. 722, 727 (Bankr. S.D.Ill.1992) (determining that because the judgment lien did not attach to the debtor's homestead interest, there is no impairment of the debtor's exemption and no encumbering lien to be avoided); *Del Vecchio v. Atico Sav. Bank (In re Del Vecchio)*, 101 B.R. 803, 805 (Bankr.S.D.Fla.1989) (noting that the "possibility that a judgment, which is *not* a lien might in the future 'interfere' with a possible, but not presently contemplated, future sale of the debtors' Homestead, does not now 'impair' the exemption already granted these debtors"); *In re Fry*, 83 B.R. 778, 779-80 (Bankr.D.Colo.1988) (holding that under Colorado law a judgment lien can never impair the debtor's homestead

exemption because the judgment lien never attaches to the exempt property).

In determining that the Hendersons' homestead exemption was impaired, the district court further relied on *Tarrant Bank v. Miller,* 833 S.W.2d 666 (Tex.App. – Eastland 1992, writ denied). In *Tarrant Bank,* the defendant was a successor in interest to a judgment obtained against the plaintiffs for a delinquent car loan. *Id.* at 667. The judgment had been abstracted and filed of record in Brown County. *Id.* The plaintiffs then entered into a contract to sell their homestead, which was located in Brown County. *Id.* The plaintiffs had requested the defendant to grant them a partial release of its lien on their homestead property. *Id.* Because the defendant refused to release its lien on the plaintiffs' homestead, the title company refused to issue an owner's title policy and the plaintiffs were unable to complete the sale of their home. *Id.* The plaintiffs then sued the defendant for slander of title. *Id.* The defendant argued that there was no justiciable controversy between the parties because its lien against the homestead was unenforceable and could not create a cloud on the plaintiffs' title to the property. *Id.* The court disagreed with the defendant and concluded that even though the lien was unenforceable, the lien could cast a cloud on the defendant's title. *Id.* at 667-68. The court concluded, therefore, that there was a justiciable controversy between the parties. *Id.* at 668.

We believe that Belknap's argument that the Hendersons' homestead property is not impaired because he can never enforce his judicial lien against the Hendersons' homestead as long as that property remains homestead property is a strong argument. It is clear to us that

because the lien is unenforceable the Hendersons' homestead exemption is not "legally impaired." However, the term "impair" encompasses more than the idea of "legal" impairment. The term impair means "to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner." BLACK'S LAW DICTIONARY 752 (6th ed. 1990). While we recognize that the Hendersons' homestead is not "legally impaired," the *Tarrant County* case has demonstrated to us that Belknap's judicial lien does impair the Hendersons' homestead exemption in a very real and practical sense. We acknowledge that the determination of whether a debtor's exemption is "impaired" is a question of federal law, but we do not believe that we must make this determination without the benefit of cases such as *Tarrant County*, which demonstrate the practical real life effects of an unenforceable judicial lien on a Texas homestead. Because Belknap's "unenforceable" lien creates a cloud on the Hendersons' title to their homestead, making it difficult if not impossible to obtain title insurance, we believe that Belknap's judicial lien "impairs," i.e., weakens, makes worse, lessens in power, diminishes, and affects in an injurious manner, their homestead exemption.[3] *See In re Robinson;*

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[3] Belknap also argues that the district court erred in allowing the Hendersons to avoid his judicial lien because the Hendersons presented little or no evidence that the lien actually "impaired" their homestead exemption. Specifically, Belknap argues that the Hendersons have presented no evidence that they are contemplating a sale of the homestead or any other evidence that their homestead exemption is actually impaired. The Hendersons counter by arguing that this point of error has been waived by Belknap because he did not raise it in the district court. Even if Belknap has not waived this issue, it is

114 B.R. at 720 (holding that even though the creditor's judicial lien did not attach, the debtor could utilize § 522(f)(1) to avoid a judicial lien in order to provide the debtor with a fresh start and to fix the status of judicial liens post-bankruptcy); *In re Calandriello*, 107 B.R. 374, 375 (Bankr.M.D.Fla. 1989) (concluding that the fact that the creditor's judicial lien is presently unenforceable against the debtor's homestead exemption does not mean that the debtor's homestead is not presently impaired because "[t]itle companies generally treat such judgments as a cloud on title to the homestead unless avoided in bankruptcy, satisfied, or otherwise removed").

IV.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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irrelevant whether the debtors are presently contemplating a sale of their homestead because Belknap's judicial lien presently places a cloud on the Hendersons' title to their homestead.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE:	§	
E.C. HENDERSON and PHYLLIS HENDERSON,	§	
Debtors,	§	
E.C. HENDERSON and PHYLLIS HENDERSON,	§	
Appellants,	§	
VS.	§	CIVIL NO. SA-93-CA-0095
LEE BELKNAP,	§	(Filed
Appellee.	§	April 1, 1993)

ORDER

Pending before the Court is the Appeal of Order Denying Motion to Avoid Judicial Lien Pursuant to 11 U.S.C. §522(f)(1) filed by E.C. and Phyllis Henderson on February 23, 1993 and the Response filed by Lee Belknap, Appellee herein, on March 10, 1993. Having reviewed the respective briefs of the parties and the record on appeal, the Court enters the following findings and order.

I. Factual and Procedural History of the Case

On October 26, 1990, Lee Belknap obtained a Texas state court judgment against E.C. and Phyllis Henderson in the amount of $197,667.21. Belknap filed an abstract of

judgment in Caldwell County, Texas on November 29, 1990, thereby creating a judicial lien against all the non-exempt real property of the Hendersons.

On June 19, 1991, the Hendersons filed for relief under Chapter Seven of the Bankruptcy Code. At the time of the filing, the Hendersons owned 131 acres of real property in Caldwell County, Texas, which is exempt under Texas law as a rural homestead. On June 17, 1992, the Bankruptcy Court denied the Hendersons' discharge pursuant to §727 of the Bankruptcy Code. On May 21, 1992, the Hendersons filed a motion to avoid the judgment lien under Bankruptcy Code section 522(f)(1) on the ground that it impairs their homestead exemption. Belknap opposed the motion, arguing that the Hendersons' discharge had been denied and the judicial lien does not "impair" the homestead exemption because it does not attach to the homestead under Texas law and therefore cannot be avoided pursuant to §522(f)(1). Following a hearing on the motion, the Bankruptcy Court entered an order on December 21, 1992 denying the Hendersons' motion. The Hendersons then filed the instant appeal.

II. Issue

The sole issue presented for resolution is: Does a judicial lien "impair" a Texas homestead under 11 U.S.C. §522(f)(1), even though a judicial lien does not "attach" to a homestead under Texas law?

III. Standard of Appellate Review

The issue before the Court is a purely legal issue and therefore is subject to *de novo* review. *In re Robinson*, 114 B.R. 716, 718 (D.Colo. 1990).

IV. Analysis

The natural starting point to resolving the issue is 11 U.S.C. §522(f)(1). Section 522(f)(1) provides as follows:

> Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is –
>
> (1) a judicial lien.

Id. There once was uncertainty whether a debtor could use §522(f) if his exemptions were created by state law and not federal law. However, it has been conclusively resolved that state law controls what property is exempt but federal law determines the availability of the lien avoidance provision. *In re Robinson*, 114 B.R. at 718. Therefore, a debtor with state-created exemptions is entitled to the protection of §522(f). *Id.* at 719.

A debtor seeking to avoid a lien on exempt property under §522(f)(1) must satisfy a three-pronged test.

(1) The lien must be a judicial lien;

(2) The lien must be against an interest of the debtor in property; and

(3) The debtor must be entitled to the exemption that the lien would impair.

In re Inman, 131 B.R. 789, 791 (Bankr.N.D.Tex. 1991); *In re Underwood*, 103 B.R. 849, 850-851 (Bankr.E.D.Mich. 1989); *In re Shands*, 57 B.R. 49, 50 (Bankr.D.S.C. 1985).

No dispute exists as to the first and third requirements. The parties agree that Belknap has a judicial lien. They also agree that the Hendersons are entitled to the homestead exemption under Texas law.[1] Thus, the only question to be answered is whether the judicial lien held by Belknap impairs the Hendersons' interest in their homestead exemption in the subject real property. The Bankruptcy Court held that it does not.

It is no mild understatement to say that there is a disagreement among the courts that have ruminated on this issue as to what is the answer. Situated on one side of this division are courts which hold that, where a judgment lien cannot attach to a debtor's homestead under the forum state's law, the judgment lien cannot be held to "impair" the debtor's homestead exemption for purposes of avoidance under §522(f)(1). *In re Cerniglia*, 137 B.R. 722 (Bankr.S.D.Ill. 1992); *In re Chabot*, 131 B.R. 720 (C.D.Calif. 1991); *In re Finch*, 130 B.R. 753 (S.D.Tex. 1991); *In re Spearman*, 124 B.R. 620 (E.D.N.Y. 1991); *In re Del Vecchio*, 101 B.R. 803 (Bankr.S.D.Fla. 1989);[2] *In re Zachary*, 99 B.R.

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[1] *See* the Texas Constitution, Article XVI, §§50 and 51; Vernon's Texas Property Code Annotated, §41.002.

[2] The Florida Constitution provides as follows:

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon . . . the following property . . .

916 (S.D.Ind. 1989); *In re Fry*, 83 B.R. 778 (Bankr.Col. 1988);[3] *In re Goodwin*, 82 B.R. 616 (Bankr.S.D.Fla. 1988). This is the analysis applied by the Bankruptcy Court in the instant case in reaching its decision to deny the Hendersons' motion to avoid.

However, the more well-reasoned analysis, and the one which this Court elects to follow, is advanced in the opinions of the courts arrayed against them on the other side of the division. These courts adhere to the view that the mere existence of a judgment lien, although not attaching to the exempt homestead, impairs the debtor's constitutional homestead exemption and, consequently, is avoidable under §522(f)(1). *See In re Bland*, 760 F.2d 1252 (11th Cir. 1985); *In re Bradlow*, 119 B.R. 330 (Bankr.S.D.Fla. 1990); *In re Watson*, 116 B.R. 837 (Bankr.M.D.Fla. 1990); *In re Robinson*, 114 B.R. 716 (D.Colo. 1990); *In re Calandriello*, 107 B.R. 374 (Bankr.M.D.Fla. 1989); *In re Bird*, No. 88-8184-Civ-Aronovitz, slip op. at 9 (S.D.Fla. 1989), *reversing*, 84 B.R. 858 (Bankr.S.D.Fla. 1988); *In re Underwood*, 103

> (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon . . . upon which the exemption shall be limited to the residence of the owner.

Florida Constitution, Article X, Section 4.

[3] The exemption allowed to Colorado residents as a homestead is found in Colorado Revised Statutes, Section 38-41-201, *et seq.* Section 38-41-201 states:

> "Every homestead in the state of Colorado occupied as a home by the owner thereof or his family shall be exempt from execution and attachment arising from any debt, contract, or civil obligation. . . . "

Id.

B.R. 849 (Bankr.E.D.Mich. 1989); *In re Hutchison*, 92 B.R. 950 (Bankr.M.D.Fla. 1988); *In re Sanderfoot*, 92 B.R. 802 (E.D.Wisc. 1988); *In re Dixon*, 85 B.R. 745 (E.D.Ohio 1988). However, this specific issue has been addressed by only two bankruptcy courts in Texas.

In *In re Inman*, 131 B.R. 789 (Bankr.N.D.Tex. 1991), Inman, the debtor, entered into a settlement agreement and agreement to pay judgment with his creditor, Dallas Flower Market, Inc. ("DFM"). Therein Inman agreed to have judgment entered against him, and granted and assigned to DFM "an interest in and a right to proceeds from the sale of" his homestead located in Dallas, Texas. He then executed an assignment in favor of DFM which DFM filed in the Deed Record of Dallas County. An agreed final judgment was entered in the state court lawsuit. However, DFM, pursuant to the terms of the settlement, did not abstract the judgment.

Inman subsequently filed his petition under Chapter 7 of the Bankruptcy Code. He claimed exemptions under Texas law pursuant to 11 U.S.C. §522(b)(2), and listed the Dallas property as his exempt homestead. Inman then filed a motion to avoid the assignment lien, an interest in his exempt homestead, and also the judgment lien pursuant to 11 U.S.C. §522(f)(1).

The question initially confronting the bankruptcy court and the one to which it dedicated the bulk of its opinion was whether the assignment lien was a "judicial lien", as that term is defined in the Bankruptcy Code.[4]

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[4] The bankruptcy court found that "[t]hat portion of the settlement resulting in the judgment caused a merger as to the

The bankruptcy court ultimately determined that the assignment lien did not constitute a "judicial lien" and could not be avoided. *In re Inman,* 131 B.R. at 793.[5]

The other question, the question of significance to this Court, was disposed of in a succinct one line finding.[6] The *Inman* court did not explain the analytical underpinning of its decision.

In *In re Swift,* 124 B.R. 475 (Bankr.W.D.Tex. 1991), Swift, the debtor, obtained a divorce in 1989. Pursuant to the divorce decree, Swift was awarded the homestead, in return for which he granted his ex-wife a lien on his homestead, agreeing that, should the sale of another house given to her not yield at least $98,000 upon sale netting at least $82,500 to her, she could then recover any deficiency out of Swift's homestead whenever it was sold.

In 1990 Swift filed for Chapter 7 relief. Creditors GNA Life Insurance Companies ("GNA") and Bank of San Antonio ("Bank-SA") joined in the trustee's objections to the exemptions claimed by Swift. In particular, the creditors claimed that the ex-wife's interest in his

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settlement and the judgment lien, but the judgment and assignment lien do not appear to have merged." *In re Inman,* 131 B.R. at 793. As a result, it was bound to determine whether either the assignment lien or the judgment lien could be avoided under §522(f)(1).

[5] The bankruptcy court based its decision on the fact that the assignment lien was the product of a consensual arrangement between the parties and had not been obtained by judgment or through any other legal proceeding. *Id.*

[6] The *Inman* court concluded that "the Judgment lien does constitute a judicial lien to which §522(f)(1) is applicable" and allowed Inman to avoid it. 131 B.R. at 793.

homestead was not protected by Swift's claimed homestead exemption and was therefore subject to attachment. They further argued that Swift was attempting to exploit his own bankruptcy to shelter his ex-wife's interest in the property. Swift, in turn, filed a motion to avoid the creditors' judicial lines on his homestead pursuant to §522(f)(1). Therein he asserted that his ex-wife simply acquired a lien on his homestead and nothing more. Consequently, his interest extended to the entire property and the judicial liens of GNA and Bank-SA could be avoided under §522(f)(1).

The bankruptcy court rejected the creditors' construction of the divorce decree and held that the judicial liens could be avoided, stating:

> There is nothing in the divorce decree that indicates that any form of interest was conveyed to Mary Swift. She was instead awarded a lien to secure repayment of a property settlement which *represented* her marital interest in the homestead. "[I]n a divorce action a lien may be placed upon a spouse's real property homestead to secure the payment of the amount awarded to the other spouse for that other spouse's homestead interest." *Lettieri v. Lettieri*, 654 S.W.2d 554, 559 (Tex.Ct.App. – Ft. Worth 1983, writ dism'd).
>
> Mary Swift's lien is not itself protected by David Swift's homestead exemption. However, it is an enforceable lien against that homestead under Texas law. *Lettieri*, 654 S.W.2d at 559 (holding that a party can foreclose on lien without violating homestead exemptions).
>
> BankSa, GNA and Mary Swift all acquired liens on the property. "[T]he Texas statutes and

> constitutional provisions respecting homestead specify the types of indebtedness for which there may be a valid lien on the homestead. Liens for any other purpose are invalid." *Matter of Daves*, 770 F.2d 1363, 1370 (5th Cir. 1985). The motion before the court requests only avoidance of BankSa and GNA's liens. The debtor's motion as to the creditors' liens, pursuant to 11 U.S.C. §522(f), is granted as to the debtor's interest in the homestead, which extends to that portion encumbered by Mary Swift's lien interest as well.

In re Swift, 124 B.R. at 487 (emphasis in original). Again, however, the bankruptcy court did not make known the basis for its implicit finding that the creditors' judicial liens "impaired" Swift's homestead exemption under §522(f)(1).

Although no Texas case has been found, this Court has discovered two out-of-state opinions, both of which involve facts slightly, but not critically, different from those of this case.

In *In re Robinson*, 114 B.R. 716 (D.Col. 1990), the Robinsons filed for relief under Chapter 7 and claimed their $2,000.00 equity interest in their home as exempt from the bankruptcy estate under the earlier mentioned Colorado Homestead Exemption, Colo.Rev.Stat. §§38-41-201, 202 (1982). After filing for bankruptcy, the Robinsons learned that Mr. Robinson's ex-wife had filed a judgment lien against the Robinsons' resident.[7] They then filed a motion to avoid the judicial lien under §522(f)(1)

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[7] The judgment arose out of Mr. Robinson's failure to pay a portion of a property settlement to his ex-wife awarded in their divorce action.

and Mrs. Robinson filed her opposition thereto. The bankruptcy court, after noting a split between the bankruptcy judges within the district, elected to follow the position espoused in *Fry, supra.* Accordingly, it denied the motion to avoid, finding that the judgment lien did not impair the Robinsons' homestead exemption because a judgment lien does not automatically attach to real property in Colorado. The Robinsons appealed.

The District Court reversed the bankruptcy court decision. Although acknowledging the holding in *Fry* and similar holdings by the courts in the Sixth Circuit, it rejected the reasoning advanced in *Fry* and its progeny. The more reasonable interpretation of §522(f)(1), it found, was contained in the cases rejecting *Fry*, explaining:

> Disagreement with Judge Brumbaugh's view in *Fry* centers on the meaning of "impair." The problems with *Fry's* narrow interpretation of the term "impair" are outlined in Judge Brook's decision in *Packer v. General Motors Acceptance Corp. (In re Packer)*, 101 B.R. 651 (Bankr.D.Colo. 1989).
>
> > [A] [s]urviving judicial lien that is avoidable may impair, or appear to impair, debtor's rights. The word "impair" is defined in Black's Law Dictionary, Fourth Revised Edition, at page 885 as follows: "To weaken, to make worse, to lessen in power, diminish, or relax or otherwise affect in an injurious manner." Section 522(f) provides for avoiding the fixing of a judicial lien to the extent it impairs an exemption. Recognizing that in Colorado a judicial lien doesn't attach to an exempt portion of property, still a judicial lien potentially impairs a debtor's right to

> claim and protect an exemption, or to otherwise set with certainty and clarity the relative rights of the debtor and a secured creditor on specific exempt property. A debtor's total inability to use Section 522(f), to fix at a time certain, the relative rights of the debtor and a judicial lien creditor in exempt property, may indeed "weaken . . . lessen in power . . . otherwise affect in an injurious manner" the debtor's rights. Absolute denial of access to Section 522(f) may leave debtor's title to real property clouded, lead to future litigation, prevent a closing, preclude title insurance, requiring posting of a bond, or otherwise impair or impede a debtor's right to deal with his real property in a free and unfettered manner.

Id. at 653. Expanding on his earlier decision in *In re Hermansen*, 84 B.R. 729, Judge Brooks gives five additional reasons why the §522(f) power should be available here: (1) to encourage the debtor's fresh start, (2) to make clear that the lien does not survive bankruptcy, (3) to fix the relative rights of debtor and secured creditor at the time of bankruptcy, (4) to establish notice and certainty of secured creditors' rights to property, and (5) to erase any uncertainty created by §522(c) that the debtor's exempt property is not subject to his pre-petition debts. *Packer*, 101 B.R. at 653; *see also In re Duden*, 102 B.R. at 798-99 (District Court decision adopting the *Packer* rationale); *Lincoln v. Cherry Creek Homeowners Ass'n (In re Lincoln)*, 30 B.R. 905, 907-09 (Bankr.D.Colo. 1983) (permitting avoidance under §522(f)(1) and noting that, in Colorado, a judicial lien attaches to non-exempt real

> property when a transcript of the judgment docket is filed with the County Recorder).

In re Robinson, 114 B.R. at 719-720. Two additional reasons cited by the *Robinson* court for its rejection of the view articulated in *Fry* were that it rendered §522(f)(1) meaningless and would allow Robinson's ex-wife to utilize §522(f) to circumvent §523(a)(5) of the Code.[8]

The other case which supplies additional and equally convincing reasons for this Court to decide the issue as it does is *In re Watson, supra*. Watson, like the Hendersons, filed for Chapter 7 relief and subsequently filed a motion to avoid the judgment lien of a bank, claiming that it impaired her homestead exemption. The bank, like Belknap, opposed the motion, arguing that Florida caseąw held that a judgment lien did not attach to homestead property as a matter of law, therefore avoidance was not an issue.

The bankruptcy court, after noting a split among the Florida bankruptcy courts, followed the line of cases holding that the mere existence of a judicial lien impairs the homestead exemption and therefore was avoidable under §522(f)(1). The correct analysis of the issue, in its view, was the one expressed in *In re Calandriello*. The *Calandriello* analysis was as follows:

> As any Florida lawyer who practices real property law knows, practical problems are presented when a certified copy of a judgment against a homeowner is recorded in the official

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[8] Section 523(a)(5) allows a debtor to discharge debts relating to a property settlement (as opposed to alimony, maintenance or support) arising out of divorce.

> records of the county in which the homeowner's homestead is located. Title companies generally treat such judgments as a cloud on title to the homestead unless avoided in bankruptcy, satisfied, or otherwise removed. When the homeowner later becomes a debtor in bankruptcy, the limitations on the debtor's actions that result denies the debtor the full enjoyment that the Florida Constitution provides. [T]he Bankruptcy Code contains a specific provision designed to prevent the debtors from experiencing problems of this sort. *In re Calandriello* at 375.

In re Watson, 116 B.R. at 838. Like the *Watson* court, this Court believes that *Calandriello* articulates the real, practical ramifications of a recorded judicial lien that counsel a rejection of the restrictive, unrealistic reasoning of *Fry* and its progeny. In fact, this same conclusion was reached in a recent Texas appellate court decision.[9] Still other compelling reasons exist for allowing avoidance of the judicial lien.

As often noted, taking a broad view of §522(f)(1) carries out "the legislative will, by implementing its objective and policy . . . [and assures] that the debtors gain a fresh start in their financial lives." *In re Galvan*, 110 B.R. 446, 451 (9th Cir.BPA 1990). That Congressional intent is expressed in the following statement:

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[9] In *Tarrant Bank v. Miller*, 833 S.W.2d 666 (Tex.App. –Eastland, 1992) (upholding district court's determination that bank's judicial lien, though unenforceable against homestead interest of homeowners, still cast a cloud on homeowners' title and award of damages for slander of title when bank refused to grant partial release to homeowners and thereby caused loss of sale of house).

> Subsection (f) protects the debtor's exemptions, his discharge, and thus his fresh start by permitting him to avoid certain liens on exempt property. The debtor may avoid a judicial lien on any property to the extent that the property could have been exempted in the absence of the lien. . . . The avoidance power is independent of any waiver of exemption.

H.R.Rep. No. 95-595, 95th Cong., 1st Sess., 362 (1977); S.Rep. No. 95-989, 95th Cong., 2d Sess. 76 (1978); U.S.Code Cong. & Admin.News 1978, pp. 5787, 6318. As noted by the courts citing this congressional statement as support for their construction of §522(f)(1), if the courts were to read §522(f)(1) to allow under collateralized judicial liens to remain on exempted property, any benefit arising from the debtor's postpetition efforts to pay down mortgage balances, maintain the property and make improvements to the property would flow to the prepetition creditor, not the debtor. *See In re LaPointe,* 150 B.R. 92 (Bankr.D.Conn. 1993), citing *In re Galvan,* 110 B.R. 446, 449-451 (9th Cir. BPA 1990) (the intent of §522(f) is to "leave enough property in the hands of the debtor to insure a 'fresh start' after discharge."; that "unsecured liens allowed to remain on the debtor's property will impair a debtor's fresh start by partaking in postpetition property acquisitions and equity build up."); *In re Brandon,* 57 B.R. 677, 679 (Bankr.W.D.N.Y. 1986) (allowing the judicial lien to remain, "would frustrate the purpose of the fresh start by not providing the debtors with an accurate determination as to the finality of their debts and would hinder the debtors' ability to amass future equity."). Accord *In re Berrong,* 53 B.R. 640, 645 (Bankr.D.Colo. 1985); *Morelock v. All Phase Elect. Supply*

Co. (In re Morelock), 47 B.R. 533, 535 (Bankr.N.D.Ohio W.D. 1985); *Rappaport v. Commercial Banking Corp. (In re Rappaport)*, 19 B.R. 971, 973 (Bankr.E.D.Pa. 1982). *Cf. Warren v. Taff (In re Taff)*, 10 B.R. 101, 106 (Bankr.D.Conn. 1981) ("the historical purpose of exemptions, whether in bankruptcy circumstances or otherwise, is to protect a debtor from creditors by permitting him to retain the basic necessities of life so that after his creditors have levied on or receive all nonexempt property, the debtor will not be left destitute and a public charge."). Also, looking at the near future, at least one court has noted that "{s]hould [sic] the debtors seek to refinance the mortgage . . . , the creditors' lien will be an effective block to any such action." *In re LaPointe*, 150 B.R. 92 (Bankr.D.Conn. 1993)

Yet another reason warranting construing §522(f)(1) to allow avoidance of the judicial lien of Belknap is that doing so would harmonize the avoidance statute with the Texas homestead exemption laws.[10] As observed by

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[10] To understand and appreciate why and to what extent the citizenry of Texas cherish and the Texas judiciary and legislature safeguard the homestead exemption, see *Chase v. Swayne*, 88 Tex. 218, 30 S.W. 1049 (1895). However, perhaps the two most important amendments to art. XVI, §51 have been adopted since *Chase*.

The first amendment, adopted in 1973, extended the benefit of the homestead exemption to unmarried adults. The second amendment came in 1983 and changed the urban homestead exemption from a value exemption to a one-acre exemption.

Although nearly a century has elapsed since the publication of *Chase*, the following observation by then Texas Supreme Court Chief Justice Brown holds as true now as then:

Judge Kane in *Robinson*, the *Fry* construction renders §522(f)(1) superfluous with regard to the homestead exemption and leads to absurd results. 114 B.R. at 720.

As the Texas courts have often stated, the laws of Texas granting a homestead exemption are most liberal. *Zwernemann v. Von Rosenburg*, 76 Tex. 522, 531, 13 S.W. 485, 489 (1890). "They are not only based upon a tender regard for the welfare of the citizen, but have for their object the stability and welfare of the state." *Andrews v. Security National Bank of Wichita Falls*, 121 Tex. 409, 417, 50 S.W.2d 253, 256 (1932). "The homestead exemption was founded on principles of soundest policy. . . . Its design was not only to protect citizens and their families from destitution, but also cherish and support in bosoms of individuals, those feelings of sublime independence which are so essential to maintenance of free institutions." *Franklin v. Coffee*, 18 Tex. 413, 416 (1857). Therefore, this provision has been guarded zealously by the courts of Texas. *Uptmor v. Janes*, 210 S.W.2d 234, 237 (Tex.Civ.App. – Waco 1948, no writ).[11] Pursuant thereto,

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> This short review of the history of homestead exemptions in this state shows that each and every decision of the court which placed a limit or restriction upon the homestead has been met with legislative enactments and constitutional provisions overruling the decisions of the court, enlarging the value of the homestead exemption, and placing in the constitution safeguards against the contingencies of future judicial construction.

88 Tex. at 227, 30 S.W. at 1053.

[11] For example, see *Patterson v* [sic] *Federal Deposit Insurance Corporation*, 918 F.2d 540 (5th Cir. 1990) (holding that, under Texas law, maker of note secured by deed of trust was not

the Texas courts have consistently acknowledged that the universal rule of construction is that "the homestead law is entitled to the most liberal construction for the accomplishment of its objects." *Williams v. Williams*, 569 S.W.2d 867, 874 (1978) (quoting *Trawick v. Harris*, 8 Tex. 312, 316 (1852). *See also Andrews v. Security Nat. Bank*, 121 Tex. at 417, 50 S.W.2d at 256; *Wallace v. First Nat. Bank of Paris*, 120 Tex. 92, 102, 35 S.W.2d 1036, 1040 (1931); *Hall v. Fields*, 81 Tex. 553, 17 S.W. 82 (1891); *Blackburn v. Knight*, 81 Tex. 326, 331, 16 S.W. 1075, 1077 (1891); *Schneider v. Bray*, 59 Tex. 668 (1883) (homestead provisions of the organic law and statutes are to be liberally construed for the purpose of effectuating the wise and salutary provisions thereof); *Blum v. Gaines*, 57 Tex. 119, 121 (1882); *Black v. Rockmore*, 50 Tex. 88, 96 (1878); *Allison v. Brookshire*, 38 Tex. 199, 201 (1873); *Cocke v. Conquest*, 120 Tex. 43, 35 S.W.2d 673, 678 (1931) (rule that homestead laws are to be liberally construed to effectuate their beneficent purpose is one of general acceptation); *Kerens Nat. Bank v. Stockton*, 120 Tex. 546, 40 S.W.2d 7 (1931); *Lifemark Corporation v. Merritt*, 655 S.W.2d 310, 314 (Tex.Civ.Ap.. [sic] – Houston [14th Dist.] 1983, *writ ref'd n.r.e.*); *Tolman v. Overstreet*, 590 S.W.2d 635, 637 (Tex.Civ.App. – Tyler 1979, no writ); *Vistron Corp. v. Winstead*, 521 S.W.2d 754, 755 (Tex.Civ.App. – Eastland 1975, no writ); *Simank v. Alford*, 441 S.W.2d 234, 237 (Tex.Civ.App. – Austin 1969, *writ ref'd n.r.e.*); *Crews v. General Crude Oil Company*, 287 S.W.2d 243, 247 (Tex.Civ.App. – Beaumont 1955, no writ); *Long Bell Lumber*

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estopped from claiming homestead exemption in foreclosure action by FDIC by virtue of contrary homestead disclaimer in deed of trust).

Co. v. Miller, 240 S.W.2d 405, 407 (Tex.Civ.App. – Amarillo 1951, no writ); *Orr v. Orr*, 226 S.W.2d 172, 173 (Tex.Civ.App. – Amarillo 1949, no writ); *Albers v. Saenger*, 222 S.W.2d 409, 411 (Tex.Civ.App. – Austin 1949, no writ); *Reconstruction Finance Corp. v. Burgess*, 155 S.W.2d 977, 980 (Tex.Civ.App. – Waco 1941, writ ref'd); *Panhandle Construction Co. v. Head*, 134 S.W.2d 779, 781 (Tex.Civ.App. – Amarillo 1939, *writ ref'd*). Texas federal courts have recognized this rule and followed it. *See Bradley v. Pacific Southwest Bank*, F.S.B.I, 121 B.R. 306, 312 (N.D.Tex. 1990); *In re Krug*, 102 B.R. 98, 99 (Bankr.W.D.Tex. 1989). To adopt the construction of §522(f)(1) proposed by Belknap and the Fry faithful and disallow the avoidance would not effectuate the objective of the Texas homestead exemption. To the contrary, it would most likely lead to the situation in *Tarrant Bank v. Miller*, 833 S.W.2d 666 (Tex.Ct.App. – Eastland 1992, no writ).

In *Tarrant Bank v. Miller*, Miller and his wife sued the Tarrant Bank under the Texas Declaratory Judgment Act for a determination that the bank's judgment lien[12] was unenforceable against their homestead and for damages arising from slander of their title. The suit was filed when the bank refused the Miller's request for a partial release

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[12] Actually, the bank was the successor in interest to a judgment obtained in Tarrant County against the Millers for a delinquent car loan. The judgment was later abstracted and filed of record in Brown County, the county of residence of the Millers.

of its lien.[13] The state district court entered judgment for the Millers, and the bank appealed.

On appeal the bank argued that the trial court erred in granting judgment against it because there was no justiciable controversy between the parties. The bank based this argument on the fact that, under Texas law, a lien created by an abstracted judgment is unenforceable as to a homestead and, therefore, cannot cast a cloud on the homeowners' title, citing *Mauro v. Lavlies*, 386 S.W.2d 825 (Tex.Civ.App. – Beaumont 1964, no writ) as its supporting authority. The appellate court rejected the bank's argument on two counts.

First, the *Tarrant Bank* court found the bank's interpretation of the *Mauro* decision to be flawed:

> *Because the lien is unenforceable as to the homestead does not mean that the lien does not cast a cloud on the title.* To so hold would mean that only enforceable claims could create a cloud.
>
> For example, a complete stranger to the title through an error in the property description could have filed an instrument which purported to convey the owner's property. Could the grantee in the misfiled deed refuse to file a correction instrument claiming that it was obvious that his grantor had no title so therefore he could not have had title? Such a position is untenable; the document, although invalid to convey title, is still a cloud. *A claim does not have*

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[13] The Millers had requested the partial release because a title company would not issue an owner's title insurance policy on the Millers' house without a partial release. The Millers had entered into a contract to sell their urban residential homestead.

> *to be valid or enforceable to cast a cloud on one's title.* Logic would dictate that most clouds arise from invalid claims on the title.

833 S.W.2d at 667-668 (emphasis added).

The appellate court also found *Mauro* was factually distinguishable. First, in the case before it there was evidence that the Millers had attempted to sell their property and could not do so because the judgment against them had been abstracted. There was no such evidence in *Mauro*. Moreover, there was also evidence that a title insurance company had refused to issue title insurance on the Millers' property where the judgment had been abstracted. Again, there was no such evidence in *Mauro*. 833 S.W.2d at 668.

The Hendersons are of advanced age. Although there is no evidence here that they presently have a contract for sale of their homestead property, it is only a matter of time until they are forced to sale [sic] their rural homestead due to their age. However, if this court allows the judicial lien held by Belknap to remain in place, the Hendersons and Belknap will then find themselves in the same predicament as their counterparts in *Miller*. Unless Belknap agrees to a partial release of his lien, the Hendersons would have no other recourse than to file a state court action for declaratory judgment and for slander of title. This, of course, would entail the expenditure of money and time by the Hendersons on court costs and attorneys fees.

In short, the Hendersons would be beset by some, if not all, of the undesirable consequences which the various aforementioned courts predicted would arise from

the adoption and application of *Fry*. Belknap, on the other hand, "loses nothing by a ruling to avoid [his] lien in full except the power to hinder." *In re Lapointe, supra*. In light of these consequences, this Court cannot affirm the Bankruptcy Court decision to deny the motion to avoid the judicial lien.

CONCLUSION

The Court concludes that the Bankruptcy Court erred in denying the Motion to Avoid Judicial Lien. Because this is a purely legal issue, there is no need to remand to the Bankruptcy Court.

Accordingly, it is ORDERED that the Bankruptcy Court's Order of December 21, 1992 denying the Motion to Avoid Judicial Lien be, and the same is hereby, REVERSED. The Motion to Avoid Judicial Lien is GRANTED.

SO ORDERED this 1st day of April, 1993.

/s/ D.W. Suttle
D.W. SUTTLE
SENIOR UNITED STATES
DISTRICT JUDGE